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The Copper Platter Doctrine Revisited [Note]

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Notes

The Copper Platter Doctrine Revisited

I. INTRODUCTION

The exclusionary rule associated with the fourth amendment, particularly as it is applied to the prosecution of state crimes, is a feature not long incorporated in the constitutional criminal law of our nation.[1] It was not until 1914 that the United States Supreme Court established[2] the rule requiring the exclusion in federal criminal prosecutions of evidence seized by federal officers in violation of the defendant's fourth amendment rights.[3] Nevertheless, the Court expressly permitted the use, in federal criminal trials, of evidence seized in violation of the fourth amendment by state and local police, since the fourth amendment was not "directed to individual misconduct of such officials."[4] Thus, evidence turned over to federal authorities on a "silver platter" was admissible.[5] The Court later held that the fourteenth amendment prohibited illegal searches and seizures by state and local police[6] and eventually rejected the silver platter doctrine.[7]

The Burger Court's dilution of constitutional criminal protec-

1. The rule was unique when adopted and even today few countries follow it. *See* Wright, *Must the Criminal Go Free If the Constable Blunders?*, 50 TEX. L. REV. 736, 736 (1972) [hereinafter cited as *Must the Criminal Go Free*].

2. The Court never expressly stated whether it was invoking the exclusionary rule as a matter of its supervisory power or whether the rule was a constitutional requirement.

3. Weeks v. United States, 232 U.S. 383 (1914). The better reading of *Weeks*, the one generally subscribed to by commentators, is that the *Weeks* Court was establishing a constitutionally based rule. *See, e.g.*, Wingo, *Growing Disillusionment With the Exclusionary Rule*, 25 SW. L.J. 573, 573 (1971) [hereinafter cited as Wingo]. The nature of the exclusionary rule became important in Mapp v. Ohio, 367 U.S. 643 (1961), when the Supreme Court held the fourth amendment applicable to the states through the fourteenth amendment. Only if the exclusionary rule was an integral part of the rights guaranteed under the fourth amendment and not simply a remedy would it be applicable to the states. *See id.* at 655. *See also* Wingo, *supra*, at 575.

4. 232 U.S. at 398.

5. Lustig v. United States, 338 U.S. 74, 79 (1949) (where federal agent called by city police to assist in illegal search of a hotel room, there is a federal search subject to the fourth amendment; if evidence is obtained by state authorities without federal assistance and is turned over to federal authorities on a silver platter, it is admissible).

6. Wolf v. Colorado, 338 U.S. 25 (1949). *See* notes 16 and 17 and accompanying text *infra*.

7. Elkins v. United States, 364 U.S. 206 (1960).

tions,[8] however, has brought into focus an analytically distinct but similar problem. Several states, striving to keep alive the Warren Court's approach to constitutional protections for criminal defendants, have created rights as a matter of state law, greater than the protections provided by the United States Constitution.[9] But in the prosecution of federal crimes, the federal courts have uniformly accepted evidence seized by state officials in violation of the law applied by that state. Admitting such evidence has been variously referred to as the "new silver platter," the "reverse silver platter,"[10] and the "copper platter" doctrine.[11] This comment will explore the case law and policies underlying the federal courts' present approach to this issue, and suggest a more appropriate resolution of the conflicting interests at stake.

II. The Silver Platter Doctrine

In *Weeks v. United States,*[12] the Supreme Court prohibited the use in federal criminal trials of evidence seized by federal officials in violation of the fourth amendment, reasoning that without this exclusionary rule, the fourth amendment right to be secure against unreasonable searches and seizures would be "of no value."[13] With limited discussion,[14] the Court announced a second and equally binding evidentiary rule in *Weeks:* evidence seized illegally by local police was admissible in federal criminal trials.[15] Thirty-five years

8. *See* Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court,* 62 Ky. L.J. 421, 421 (1974) [hereinafter cited as *New Federalism*].

9. *See* Wilkes, *More on the New Federalism in Criminal Procedure,* 63 Ky. L.J. 873, 873-74 (1975) [hereinafter cited as *More New Federalism*].

10. *See* Note, *Expanding State Constitutional Protections and the New Silver Platter: After They've Shut the Door, Can They Bar the Window?,* 8 Loy. U.L.J. 186 (1976) [hereinafter cited as *New Silver Platter*].

11. *See* Ziegler, *Constitutional Rights of the Accused—Developing Dichotomy Between Federal and State Law,* 48 Pa. B.A.Q. 241, 251 (1977) [hereinafter cited as Ziegler].

12. 232 U.S. 383 (1914).

13. *Id.* at 393.

14. *See* Elkins v. United States, 364 U.S. 206, 210 (1960).

15. 232 U.S. at 398. An entire body of case law arose to determine when a search was federal or local. In Byars v. United States, 273 U.S. 28 (1927), the Court stated that "the *mere* participation in a state search of one who is a federal officer does not render it a federal undertaking . . . ." *Id.* at 32. But where the participation of the agent in the search was under color of his federal office and where the search was in substance and effect a joint operation of the local and federal officers, it was a federal search. *Id.* at 33. In Lustig v. United States, 338 U.S. 74 (1949), the Court declared the decisive factor was "the actuality of a share by a federal official in the total enterprise of securing and selecting evidence by other than

later in *Wolf v. Colorado,*[16] the Court held that illegal searches and seizures by state police were prohibited by the fourteenth amendment, but refused to require that the exclusionary rule be applied by the states.[17] *Wolf* necessarily cast doubt on the validity of the silver platter doctrine,[18] and in 1960, in *Elkins v. United States,*[19] the doctrine was discarded.

Wolf had removed the doctrinal underpinning for the distinction announced in *Weeks:* evidence obtained by state police in an unreasonable search or seizure was now in violation of the Constitution. Thus, regardless of whether federal or state officials conducted the

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sanctioned means." *Id.* at 79. Even if the agent joined the search while it was in progress and he was in no way responsible for initiating the search, he could be deemed to have participated in it. Where there was federal participation, federal constitutional law was applied. *Id.*

Since Mapp v. Ohio, 367 U.S. 643 (1961), whether the search was state or federal, federal constitutional standards have measured the validity. But the federal/state distinction has retained vitality because of statutory requirements—validity of a federal search is conditioned upon a finding that the warrant satisfies federal constitutional requirements *and* the provisions of FED. R. CRIM. P. 41. *See* United States v. Sellers, 483 F.2d 37, 43 (5th Cir. 1973), *cert. denied,* 417 U.S. 908 (1974); United States v. Coronna, 420 F.2d 1091 (5th Cir. 1970).

What factors a court actually considers in making the determination was demonstrated in United States v. Bedford, 519 F.2d 650 (3d Cir. 1975), *cert. denied,* 424 U.S. 917 (1976), where the court held the search to be state in nature—federal agents participated solely to supply additional manpower:

> (1) [T]he warrant was issued under state law and directed to state officers; (2) the warrant was predicated on probable violation of state narcotics laws; (3) there was no evidence of bad faith on the part of either the state or federal officers; (4) federal agents did not assist in the obtaining of the warrant; (5) there was no evidence that federal agents instigated or supervised the search; (6) defendant was initially arrested by local police officers; (7) the majority of the evidence was found by local officers; and (8) the products of the search, placed in the custody of local police, formed the basis of a state prosecution.

Id. at 654 n.1.

16. 338 U.S. 25 (1949).

17. Justice Frankfurter, speaking for a majority of the Court, declared the security of one's privacy against arbitrary intrusion by the police to be basic to a free society. It was therefore "implicit in the concept of ordered liberty" and thus enforceable against the states through the due process clause of the fourteenth amendment. *Id.* at 27.

18. The *Wolf* Court did not adopt an "incorporation" approach to the fourteenth amendment. If the decision in *Wolf* had incorporated the fourth amendment into the fourteenth amendment, the exclusionary rule would have been applied to the states as part of the "bag and baggage" of the fourth amendment. *See* Wingo, *supra* note 3, at 573. If the exclusionary rule had been applicable to the states, the *Elkins* decision probably would have been unnecessary.

The plurality opinion in Mapp v. Ohio, 367 U.S. 643 (1961), unpersuasively argued that *Wolf* did incorporate the fourth amendment into the fourteenth amendment. *See id.* at 655. Dissenting in *Mapp,* Justice Harlan pointed out their error. *See id.* at 679. *See generally* Wingo, *supra* note 3, at 574-75.

19. 364 U.S. 206 (1960).

unreasonable search, the evidence was illegally seized, and under the theory of *Weeks,* the Court should exclude evidence obtained in violation of the Constitution. Yet the logic of this approach was not alone sufficient, the Court said, to justify the exclusion of relevant evidence from a federal trial. Other considerations had to be present before the need for complete disclosure of evidence would be outweighed.[20] The first of these other considerations relied on in *Elkins* was the much-maligned theory that the exclusionary rule deters constitutional violations.[21] Thus, the effect of its decision, the Court theorized, would be to compel state police to respect the guarantees of the fourth amendment.[22] A second and probably more important consideration was the concept of federalism. "The very essence of healthy federalism depends upon the avoidance of needless conflicts between state and federal courts."[23] Even before *Elkins,* many states had adopted an exclusionary rule as a matter of state law. The Court theorized that federal courts sitting in exclusionary states were frustrating state policy by admitting evidence lawlessly seized by state agents. Elimination of the silver platter doctrine would ease the resulting tensions.[24] Finally, the Court justified its decision by giving due regard to "the imperative of judicial integrity." If the American system is to succeed, said the Court, the government cannot commit crimes or be an accomplice to the willful disobedience of the Constitution in order to secure the conviction of a private criminal.[25] These considerations led the Court to abolish the silver platter doctrine, doing so as a matter of its supervisory power over the administration of criminal justice in the federal courts. After *Elkins,* evidence seized by state officials during a search which, if conducted by federal officers would have violated the fourth amendment, was inadmissible in federal court.[26]

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20. *Id.* at 216.

21. Chief Justice Burger has often expressed his displeasure with the rule. *See, e.g.,* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411-24 (1971) (Burger, C.J., dissenting); Stone v. Powell, 428 U.S. 465, 496-502 (1976) (Burger C.J., concurring). Commentators as well have expressed disillusionment with the rule, basically arguing that there is no proof that it has the intended "deterrent" effect on illegal police conduct. *See, e.g.,* Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. CHI. L. REV. 665 (1970); Wingo, *supra* note 3; *Must the Criminal Go Free, supra* note 1.

22. *See* 364 U.S. at 216-21.

23. *Id.* at 221.

24. *Id.*

25. *Id.* at 222-23.

26. *Id.* Under its supervisory power, the Court barred from federal trials evidence illegally seized by state police. One year later in Mapp v. Ohio, 367 U.S. 643 (1961), the Court held

III. The Copper Platter Doctrine

A. The Seeds

In an interesting bit of dicta, the *Elkins* Court stated that the test used to determine the legality of the search was "one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed."[27] Conceivably, the Warren Court did not anticipate much controversy from its new evidentiary rule. Committed as it was to promoting an accused's constitutional rights, it did not perceive the states as being the eventual champions of such rights.[28] But the conservative majority of the Burger Court has, at the very least, caused a halt to the Warren Court's "criminal procedure revolution" and has occasionally cut back on the rights of criminal suspects.[29] Far from accepting these minimal federal standards, several state courts have sought to restore the protections stripped by the Burger Court and maintain the Warren Court's more liberal philosophy.[30]

The question which initially confronted both the state courts and

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that the fourth amendment, incorporated into the fourteenth amendment, barred the use of evidence seized by state police in state trials. After *Mapp*, the *Elkins* rule could be viewed as one of constitutional dimension. *See* note 17 *supra*.

27. 364 U.S. at 224. To the extent the rule required that federal law be applied even when the state law imposed a stricter standard, it was dicta. The evidence introduced in the federal criminal trial against Elkins was obtained by state police during a search of the home of one of the defendants under a warrant invalid by federal standards. *See id.* at 207 n.1.

28. Nevertheless, as Justice Frankfurter pointed out in his dissent in *Elkins*, many more restrictive state rules existed even then. For example, some states imposed a more restrictive right of search incident to arrest and imposed more exacting standards of probable cause. *See id.* at 247 (Frankfurter, J., dissenting).

29. *New Federalism, supra* note 8, at 421. Wilkes cites as examples: the Court's acceptance of nonunanimous jury verdicts in state criminal cases, Samuels v. Mackett, 401 U.S. 66 (1971), and of the use of immunity to compel incriminating testimony, Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472 (1972); the Court's narrow interpretation and nonretroactive application of Warren era decisions, for example, Harris v. New York, 401 U.S. 222 (1971), and Michigan v. Payne, 412 U.S. 47 (1973); and the Court's upholding through the use of the harmless error doctrine of convictions in which the accused's rights were plainly violated, Schneble v. Florida, 405 U.S. 427 (1972). *See New Federalism, supra* note 8, at 423-24.

30. *More New Federalism, supra* note 9, at 873. Wilkes discusses as examples the California case of People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975), which rejected the Supreme Court's rule in United States v. Robinson, 414 U.S. 218 (1973), which held that the fourth amendment permitted a police officer to conduct a full body search after a custodial arrest for any offense, and the Pennsylvania case of Commonwealth v. Richman, 458 Pa. 167, 320 A.2d 351 (1974), which rejected the Supreme Court's decision in Kirby v. Illinois, 406 U.S. 682 (1972), that the defendant has no right to counsel at an identification session after arrest but prior to the filing of formal charges.

the Supreme Court, and the one which intrigued commentators,[31] was whether the state courts would attempt to evade the Supreme Court's interpretation of the Federal Constitution and if so, whether they would be successful. Historically, the Court has declined to review judgments of state courts resting on adequate state grounds.[32] The Supreme Court, therefore, soon acknowledged that the state courts, as the ultimate arbiters of state law, were free to interpret a provision of the state constitution more expansively than a textually identical or parallel provision of the United States Constitution.[33] Similarly, the state supreme courts could impose a more stringent exclusionary rule as a matter of their supervisory power over their own courts.[34] Although the states could not impose greater restrictions on their own law enforcement officials as a matter of federal constitutional law,[35] the greater restrictions were valid when

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31. *See, e.g., New Federalism, supra* note 8; *More New Federalism, supra* note 9; *New Silver Platter, supra* note 10; Note, *Commonwealth v. Richman: A State's Extension of Procedural Rights Beyond Supreme Court Requirements,* 13 DUQ. L. REV. 577 (1975).

32. *See* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 107, at 542-48 (3d ed. 1976). Statutory authority for Supreme Court review of state court decisions is conferred by 28 U.S.C. § 1257 (1970), which restricts review to state judgments involving federal questions. The Supreme Court will not disturb state court decisions resting on adequate, independent state grounds (*e.g.*, state constitution) that do not contravene the Federal Constitution, even though a federal question is involved (*e.g.*, Federal Constitution) because after the Supreme Court corrected the federal question, the state court could render the same judgment. *See also New Federalism, supra* note 8, at 426-31.

33. Oregon v. Hass, 420 U.S. 714 (1975). The Court held that the Oregon Supreme Court had erred in ruling that the Federal Constitution barred the impeachment use of incriminating statements obtained from defendant after his request for counsel had been denied. In doing so the Court noted that "a State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards . . . . But, of course, a State may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them." *Id.* at 719 (emphasis by the Court) (citations omitted). *See also* Cooper v. California, 386 U.S. 58, 62 (1967).

Even before *Hass*, the California Supreme Court stated in People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315, where it rejected the Supreme Court's rule in United States v. Robinson, 414 U.S. 218 (1973): "[T]he Supreme Court has clearly recognized that state courts are the ultimate arbiters of state law, even textually parallel provisions of state constitutions, unless such interpretations purport to restrict the liberties guaranteed the entire citizenry under the federal charter." 13 Cal. 3d at 548, 531 P.2d at 1112, 119 Cal. Rptr. at 328.

34. *See* People v. Jackson, 391 Mich. 323, 217 N.W.2d 22 (1974), where the Michigan court rejected the Supreme Court's decision in Kirby v. Illinois, 406 U.S. 682 (1972) and held that a Michigan defendant is entitled to assistance of counsel at any pretrial lineup. The court characterized its holding as an exercise of its constitutional power to establish rules of evidence applicable to judicial proceedings in Michigan courts.

35. Oregon v. Hass, 420 U.S. 714, 719 (1975). *See* note 33 and accompanying text *supra.*

properly implemented. The question having been thus decided, federal courts were called upon to exclude from consideration in the prosecution of a federal crime, the fruits of searches by state officers in violation of state constitutional law, even though the method of obtaining the evidence might have complied with the requirements of the fourth and fifth amendments as interpreted by the Supreme Court. Of the nine United States Circuit Courts of Appeals which have been presented with this claim, all have admitted the evidence.[36]

B. The Growth

Admission of such evidence is, without much argument, consistent with the mandate of case law. As previously noted,[37] *Elkins* stated that the test of admission was one of federal law, regardless of a more or less stringent rule applied by the state. Admittedly, this portion of *Elkins* was dicta, but at least one court[38] has asserted that *Elkins'* companion case, *Rios v. United States,*[39] *held* that federal law was applicable even when the state standard was stricter. The defendant in *Rios* was prosecuted in state court for possession of narcotics, and acquitted when the state court suppressed the evidence seized by local police officers. The evidence was then given

36. Second Circuit: United States v. Burke, 517 F.2d 377 (2d Cir. 1975). Third Circuit: United States v. Scolnick, 392 F.2d 320 (3d Cir.), *cert. denied sub. nom.* Brooks v. United States, 392 U.S. 931 (1968); United States v. Bedford, 519 F.2d 650 (3d Cir. 1975), *cert. denied,* 424 U.S. 917 (1976); United States v. Shaffer, 520 F.2d 1369 (3d Cir. 1975), *cert. denied,* 423 U.S. 1051 (1976). Fourth Circuit: United States v. Johnson, 451 F.2d 1321 (4th Cir. 1971), *cert. denied,* 405 U.S. 1018 (1972). Fifth Circuit: United States v. Clegg, 509 F.2d 605 (5th Cir. 1975); United States v. Coronna, 420 F.2d 1091 (5th Cir. 1970). Sixth Circuit: United States v. Votteller, 544 F.2d 1355 (6th Cir. 1976); United States v. Hodge, 539 F.2d 898 (6th Cir. 1976), *cert. denied,* 429 U.S. 1091 (1977); United States v. Dudek, 530 F.2d 684 (6th Cir. 1976). Seventh Circuit: United States v. Infelice, 506 F.2d 1358 (7th Cir. 1974), *cert. denied,* 419 U.S. 1107 (1975); United States v. Martin, 372 F.2d 63 (7th Cir. 1967), *cert. denied,* 387 U.S. 919 (1968). Eighth Circuit: United States v. Allery, 526 F.2d 1362 (8th Cir. 1975); United States v. Neville, 516 F.2d 1302 (8th Cir.), *cert. denied,* 423 U.S. 925 (1975). Ninth Circuit: United States v. Hall, 543 F.2d 1229 (9th Cir. 1976), *cert. denied,* 429 U.S. 1075 (1977); United States v. Keen, 508 F.2d 986, (9th Cir. 1974), *cert. denied,* 421 U.S. 929 (1975). Tenth Circuit: United States v. Millar, 543 F.2d 1280 (10th Cir. 1976); Ferguson v. United States, 307 F.2d 787 (10th Cir. 1962), *rev'd on other grounds,* 375 U.S. 962 (1963).

37. *See* note 27 and accompanying text *supra.*

38. *See* United States v. Dudek, 530 F.2d 684, 690 (6th Cir. 1976) (court recognizes that statement in *Elkins* made in the context of a more restrictive federal standard of admissibility than that of the state concerned and may be regarded as dicta; however, in *Rios,* federal standard was held to prevail over a *possibly* more restrictive state standard).

39. 364 U.S. 253 (1960).

to federal authorities. In the federal prosecution which followed, the evidence was admitted on alternative grounds—the silver platter doctrine or search incident to a lawful arrest—and the defendant was convicted.[40] The Supreme Court cited *Elkins* to invalidate the lower court's reliance on the silver platter doctrine and remanded to the district court to determine the legality of the arrest and the search under federal law.[41] Since the evidence was suppressed in the state court but held validly seized as incident to a lawful arrest in federal court, the state arguably applied a stricter standard. The remand by the Supreme Court indicated that the stricter standard was not to apply. But this is not necessarily an accurate reading of *Rios,* since it is not clear that the state employed a higher standard for probable cause. Rather it appeared the state court made a factual determination of no probable cause using a federal standard.[42] The remand by the Supreme Court could, therefore, have been aimed at a distinct element of the *Elkins* test—the federal court must make an independent inquiry whether or not there has been a state inquiry.[43]

In admitting the evidence, other lower federal courts have found support in pre-*Elkins* decisions of the Supreme Court raising issues analogous to those present in "copper platter" cases. In *Olmstead v. United States*[44] and *On Lee v. United States,*[45] federal agents obtained evidence in violation of state laws; in *Olmstead,* the agents tapped a telephone line,[46] and in *On Lee,* a conversation was overheard via a hidden transmitter on a government informer.[47] In both

40. *Id.* at 254.

41. *Id.* at 261-62.

42. It is not clear whether the judge was using a state standard stricter than the federal standard. The state trial judge could not find that probable cause existed based simply on the defendant's suspicious activities. *See id.* at 258 n.3. The Supreme Court apparently agreed that probable cause was lacking and made no mention of a stricter state standard: "Yet upon no possible view of the circumstances revealed in the testimony of the Los Angeles officers could it be said that there existed probable cause for an arrest at the time . . . ." *Id.* at 261.

43. Immediately before declaring that the test was to be one of federal law, the *Elkins* Court stated: "in determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry, whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned out." *Id.* at 223-24.

44. 277 U.S. 438 (1928).

45. 343 U.S. 747 (1952).

46. 277 U.S. at 456-57.

47. 343 U.S. at 749.

cases the Court held that the violation of state law did not render the evidence inadmissible in federal courts.[48]

The cases can be readily distinguished from those in which a seizure by state police violates state constitutional standards since the "wrongful" conduct in *Olmstead* and *On Lee* was that of federal agents, and state control over federal activities is practically nonexistent.[49] Nevertheless, the cases indicate that state law will have no impact on federal evidentiary rules.

A curious deviation from this entrenched policy of applying federal law occurred in a pre-*Elkins* Supreme Court case, *United States v. Di Re.*[50] The defendant was arrested without a warrant by New York police for a federal offense. The Supreme Court held that under these circumstances, the law of the state would govern in the absence of an applicable federal statute.[51] Thus, the admissibility of evidence seized incident to a warrantless arrest was determined, at least initially, by a state's arrest law. Some circuits interpreted *Elkins* as sapping all vitality from *Di Re,* ruling that federal courts

48. Olmstead v. United States, 277 U.S. at 468-69; On Lee v. United States, 343 U.S. at 754-55.

49. The Supremacy Clause, U.S. CONST. art. VI, requires that activities of the federal government be free from state regulation. *See* Mayo v. United States, 319 U.S. 441, 445 (1943). *See generally* B. SCHWARTZ, CONSTITUTIONAL LAW § 29 (1972). Thus, the states' power to control employees of the federal government, in this case, federal law enforcement agents, while carrying out that employment is minimal. In Johnson v. Maryland, 254 U.S. 51 (1920), the defendant was convicted for driving a post office truck transporting mail in Maryland without a license. The Court held that the immunity of the instruments of the United States from state control in the performance of federal duties extended to driving license requirements. But direct state interference with federal functions was permitted where the public inconvenience from the interference was slight and outweighed by inconvenience to the state. United States v. Kirby, 74 U.S. (7 Wall.) 482 (1869) (arrest of mail carrier for murder is not obstructing mail).

Some of the arguments for applying state law when state police-obtained evidence is introduced in federal court are applicable to federal agent-obtained evidence. *See* Olmstead v. United States, 277 U.S. 438, 469 (Holmes, J., dissenting), 471 (Brandeis, J., dissenting) (1928). However, supremacy questions are much more troublesome when the contested evidence was seized by federal officials. This comment focuses on applying state law when the evidence was seized by state police officers. *See* note 159 *infra.*

50. 332 U.S. 581 (1948).

51. *Id.* at 589. It is interesting to note that the rationale for the *Di Re* decision is no longer valid. The Court applied state law to determine the validity of warrantless arrests at least in part because the then-existing federal statute on arrests by warrant called for conformity with the particular state's usual mode of process. *See id.* Under the modern statute, 18 U.S.C. § 3041 (1970), the standards for federal warrants of arrest are set by the Federal Rules of Criminal Procedure. *See* United States v. Hall, 543 F.2d 1229, 1234 n.5 (9th Cir. 1976), *cert. denied,* 429 U.S. 1075 (1977).

must apply federal law in resolving evidentiary questions.[52] Other circuits have continued to apply *Di Re* to pure arrest questions,[53] and a recent Supreme Court case cited *Di Re* with approval.[54] Whether *Di Re* has been overruled is, therefore, questionable.

The more troublesome question posed by *Di Re* is how it is to be applied. At issue in *United States v. Hall*,[55] a circuit court decision, was the admissibility of evidence seized incident to an arrest. In making the arrest, state officers relied on information obtained by federal agents in a wiretap. The defendant alleged that the wiretap was unlawful under California law and that the use of such information violated California law; he argued that under state law, the arrest and the subsequent search and seizure was therefore illegal as a fruit of the wiretap and the evidence thus inadmissible, citing *Di Re*.[56] The court held *Di Re* was not applicable. First, *Hall* was not a situation where a federal statute was lacking—the wiretapping was sanctioned by federal statute.[57] The court found a second and "more fundamental" reason for distinguishing *Di Re*: "*Di Re* concerned the quantity of evidence necessary for a warrantless arrest, not the source of admissibility of that evidence."[58] Hall's argument was not that the state officers lacked probable cause or otherwise failed to comply with the state's arrest law, but that the state police used impermissible evidence in establishing probable cause.

In a strong dissent, three circuit judges postulated that a state's judicial limitation on the manner in which state officers obtain information is a limitation on the arrest power as valid as any statutory requirement. Hall's arrest under California standards was ille-

52. *See* United States v. Melancon, 462 F.2d 82, 91-92 (5th Cir.), *cert. denied*, 409 U.S. 1038 (1972); United States v. Miller, 452 F.2d 731, 733 (10th Cir. 1971), *cert. denied*, 407 U.S. 926 (1972); United States v. Sims, 450 F.2d 261, 262-63 (4th Cir. 1971). *See also New Silver Platter, supra* note 10, at 202-03.

53. *See, e.g.*, United States v. Hall, 543 F.2d 1229 (9th Cir. 1976), *cert. denied*, 429 U.S. 1075 (1977); United States v. Lyles, 488 F.2d 290, 292 & n.4 (5th Cir.) (doctrine still followed in most cases), *cert. denied*, 419 U.S. 851 (1974); Montgomery v. United States, 403 F.2d 605, 608 (8th Cir. 1968), *cert. denied*, 396 U.S. 859 (1969).

54. United States v. Watson, 423 U.S. 411, 420 n.8 (1976) ("The rule recognized by the Court [is] that even in the absence of a federal statute granting or restricting the authority of federal law enforcement officers, 'the law of the state where an arrest without warrant takes place determines its validity.' ").

55. 543 F.2d 1229 (9th Cir. 1976), *cert. denied*, 429 U.S. 1075 (1977).

56. *Id.* at 1232.

57. *Id.*

58. *Id.* at 1233.

gal and under *Di Re* should be held invalid in federal court.[59]

The factual situation in *Hall* is probably within a literal reading of *Di Re*. But the majority's approach in *Hall* appears to be more consistent with the *Elkins* rule. *Di Re* should not compel federal courts to defer to state law in deciding the admissibility of evidence used to justify a warrantless arrest. But even assuming a more expansive interpretation of *Di Re* is proper, the case has little impact on the questions which are the focus of this comment. Only occasionally is the question before the court one of the admissibility of evidence seized incident to an arrest. More frequently, the issue concerns other areas of search and seizure law.

IV. Policy Considerations

As the above discussion shows, case law overwhelmingly supports the admission in federal court of evidence seized by state officers in violation of state law if the seizure meets minimal federal standards. Probably because of this mandate, few courts have attempted to analyze the underpinnings of the copper platter doctrine. The lack of discussion, however, is both unfortunate and ironic. In abolishing the silver platter doctrine, the *Elkins* Court expressed disappointment in the legal community for accepting without question for thirty-five years, an evidentiary rule promulgated by the Supreme Court without much discussion.[60] But the *Elkins* Court fell prey to its own admonishment, creating the copper platter doctrine with no discussion of the competing policies at stake.

Certainly, the silver platter doctrine and the copper platter doctrine do not generate the same constitutional objections. The *Elkins* Court noted that the evidence handed over to federal authorities on a "silver platter" was, after *Wolf*, seized in violation of the United States Constitution, the law which the Supreme Court is bound to uphold. In the typical copper platter situation, the state police have violated a state constitutional or statutory provision, but their actions are entirely permissible under the United States Constitution. The Supreme Court is not *bound* by state law and may accept the

59. *Id.* at 1246.

60. The Court stated: "Despite the limited discussion of this second ruling in the *Weeks* opinion, the right of the prosecutor in a federal criminal trial to avail himself of evidence unlawfully seized by state officers apparently went unquestioned for the next thirty-five years." 364 U.S. at 210.

evidence. This distinction may appear obvious, but many defendants have overlooked it, causing some courts to misapprehend the issue before them. For example, in *United States v. Scolnick,*[61] the defendant alleged that the search of his safe deposit box by local police violated a Pennsylvania statute; therefore, he argued, the contents were inadmissible in a federal criminal prosecution because of the fourth amendment.[62] With the issue so framed, the result is foregone. The requirements of the fourth amendment are determined by the Supreme Court. As the Court stated in *Oregon v. Hass,*[63] state courts "may not impose . . . greater restrictions as a matter of *federal constitutional law* when [the Supreme] Court specifically refrained from imposing them."[64] State statutes should be similarly ineffective in imposing greater federal constitutional rights. Thus, a violation only of state law cannot give rise to a federal constitutional requirement of exclusion.[65]

Recall, however, it was not the logic of the constitutional approach upon which the *Elkins* Court relied in discarding the silver platter doctrine. Rather, the notions of federalism and judicial integrity are what prompted the Court to exercise its supervisory power and exclude relevant evidence.[66] While *Elkins* and *Hass* preclude the exclusion of evidence as a matter of federal constitutional law, a careful reading of those cases indicates that a defendant can legitimately argue that the evidence should be excluded on policy considerations of federalism and judicial integrity. Nowhere is the

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61. 392 F.2d 320 (3d Cir.), *cert. denied sub. nom.* Brooks v. United States, 392 U.S. 931 (1968).

62. *Id.* at 323.

63. 420 U.S. 714 (1975).

64. *Id.* at 719.

65. A similar contention was raised by the defendant in United States v. Clegg, 509 F.2d 605, 614 (5th Cir. 1975), where the defendant argued that, in spite of the fact that he was prosecuted in a federal court for a federal crime, his fourteenth amendment rights were violated because the evidence seized by state police would have been excluded by the state courts. The court rejected this as meritless.

Defendant's theory of the fourteenth amendment as a limitation on the federal government is not altogether clear. Nevertheless, the basic argument here, that violation of state law may give rise to a federal constitutional objection is not entirely specious. Justice Traynor of the California Supreme Court, commenting upon *Mapp,* recognized that federal rules and state rules might vary and urged that federal rules not automatically replace local ones. Necessarily aware of the *Olmstead* line of cases and the *Elkins* decision, Traynor nevertheless assumed that local rules would have "constitutional sanction, for whatever action is illegal is perforce unreasonable." Traynor, *Mapp v. Ohio at Large in the Fifty States,* 1962 DUKE L.J. 319, 328 [hereinafter cited as Traynor].

66. *See* notes 20-25 and accompanying text *supra.*

need for a policy decision better evidenced than in the double prosecution cases. For example, in *United States v. Bedford,*[67] the defendant was charged with possession of narcotics, seized by local police during a search of the defendant's residence pursuant to a search warrant. In the state action, the defendant was acquitted after the evidence was suppressed, apparently because the warrant was invalid due to an unreasonable delay in its execution.[68] The evidence was transferred to federal authorities and the defendant was successfully prosecuted for violating federal laws[69] because the warrant was valid under federal constitutional requirements.

Perhaps sensing the conflict inherent in such an outcome, some circuits have attempted to rationalize the admission of evidence obtained in violation of a state constitution. Relying on the Supreme Court's opinion in *Olmstead v. United States,*[70] the Ninth Circuit has asserted that the exclusionary rule is "integrally bound up with the constitutional protections of the fourth amendment," and therefore does not compel exclusion of evidence seized in violation of state standards.[71] In *Olmstead,* the Supreme Court stated that without congressional sanction courts did not have the discretion to exclude evidence obtained in an unethical manner if the seizure was constitutional, because such a rule would be at variance with the common law doctrine.[72] At common law, the admissibility of evidence was not affected by the illegality of the means through which the evidence was obtained.[73] Thus, the Ninth Circuit has held that "[w]here no constitutional right has been abused, the admissibility of evidence is governed by common law principles."[74]

The validity of this black letter rule is questionable. In *On Lee v.*

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67. 519 F.2d 650 (3d Cir. 1975), *cert. denied,* 424 U.S. 917 (1976).

68. *Id.* at 653, 656.

69. There is no fifth or fourteenth amendment (double jeopardy) violation in prosecuting an individual once under federal law and once under state law for the same act. *See* Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959). Similarly, notions of collateral estoppel are not applicable. *See* Ashe v. Swenson, 397 U.S. 436 (1970).

70. 277 U.S. 438 (1928).

71. United States v. Keen, 508 F.2d 986, 988 (9th Cir. 1974), *cert. denied,* 421 U.S. 929 (1975). *See also* United States v. Hall, 543 F.2d 1229, 1235 (9th Cir. 1976), *cert. denied,* 429 U.S. 1075 (1977).

72. 277 U.S. at 468.

73. As a general rule, our legal system does not attempt to do "justice" incidentally and to enforce penalties by indirect means. *See* 8 J. WIGMORE, EVIDENCE § 2183, at 7-8 (McNaughton rev. ed. 1961).

74. United States v. Keen, 508 F.2d at 989.

United States,[75] the Court commented on its power to fashion exclusionary remedies: "In order that constitutional or statutory rights may not be undermined, this Court has on occasion evolved . . . exclusionary rules of evidence going beyond the requirements of the constitutional or statutory provision."[76] Thus, it appears the courts' powers are not as limited as *Olmstead* and the Ninth Circuit suggest.[77]

The nature of the exclusionary rule and its treatment by the Burger Court have furnished some courts a second ground for justifying the copper platter doctrine. The exclusionary rule is by no means a universally accepted resolution to constitutional violations by police,[78] and has been subject to constant criticism since its adoption by the Supreme Court.[79] Cardozo crystallized the many objections in stating: "The criminal is to go free because the constable has blundered."[80] The exclusionary rule blocks the introduction of arguably relevant and trustworthy evidence and hence is an obstacle to the truth-finding function. Whether the rule is an effective control on police conduct or not, it operates only at a great cost to society.[81] Thus, the Second Circuit noted in justifying nonapplication of the rule to violations of state constitutional law: "[The]

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75. 343 U.S. 747 (1952).

76. *Id.* at 755.

77. Nevertheless, the courts are "wary" to extend the exclusionary rule in search and seizure cases to violations which are not of constitutional magnitude. *See* United States v. Burke, 517 F.2d 377, 386 (2d Cir. 1975).

78. Countries with whom we share many of our legal traditions, such as England and Canada, did not at the time the United States Supreme Court developed the exclusionary rule, and still do not, make the admissibility of evidence at trial depend on how the evidence was obtained. Before the Supreme Court imposed the exclusionary rule on the states in 1961, only about one-half had adopted a similar restriction. *See Must the Criminal Go Free, supra* note 1, at 736. *See also* Williams, *The Exclusionary Rule Under Foreign Law—England*, 52 J. CRIM. L. C. & P.S. 272 (1961).

79. *See, e.g.*, Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970); Waite, *Judges and the Crime Burden*, 54 MICH. L. REV. 169 (1955); Wingo, *supra* note 3; *Must the Criminal Go Free, supra* note 1.

80. People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926). The plurality opinion in Irvine v. California, 347 U.S. 128 (1954) also succinctly catalogues the doctrine's defects:

> Rejection of the evidence does nothing to punish the wrong-doing official, while it may, and likely will, release the wrong-doing defendant. It deprives society of its remedy against one lawbreaker because he has been pursued by another. It protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches.

Id. at 136.

81. *See* notes 79-80 and accompanying text *supra*. *See generally* MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 166 (2d ed. E. Cleary 1972).

rule . . . [is] 'a blunt instrument, conferring an altogether disproportionate reward . . . .'"[82] Circuit courts relying on the nondesirability of the exclusionary rule further prop their decisions by pointing out the Burger Court's, and particularly Chief Justice Burger's,[83] dissatisfaction with the rule.[84] Finding the rule's deterrent effect minimal in certain situations, the Court has limited the rule's scope in decisions such as *United States v. Janis*[85] and *Stone v. Powell.*[86] Since the Supreme Court is reluctant to extend the exclusionary rule as a matter of federal constitutional law, these lower courts apparently have inferred that the exclusionary rule should not be extended for any reason. But in thus focusing on the question, the courts are once again demonstrating their misconception of the nature of the issue before them. The balance is not simply the deterrent effect of the exclusionary rule versus the cost to society. A state has determined that the cost *is* worthwhile to control the conduct

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82. United States v. Burke, 517 F.2d 377, 386 (2d Cir. 1975).

83. *See, e.g.*, Brewer v. Williams, 430 U.S. 387, 420 (1977) (Burger, C.J., dissenting) ("the Court errs gravely in mechanically applying the exclusionary rule without considering whether that Draconian judicial doctrine should be invoked"); Stone v. Powell, 428 U.S. 465, 496 (1976) (Burger, C.J., concurring) ("it seems clear to me that the exclusionary rule has been operative long enough to demonstrate its flaws"); Bivens v. Six Unknown Named Agents, 403 U.S. 388, 412-24 (1971) (Burger, C.J., dissenting).

84. *See, e.g.*, United States v. Hall, 543 F.2d 1229, 1235 & n.6 (9th Cir. 1976) (court concluded that trial court did not err in admitting in federal criminal prosecution evidence seized by state police in violation of state law because states do not control rules of federal evidence and because Supreme Court is reluctant to extend exclusionary rule), *cert. denied*, 429 U.S. 1075 (1977).

85. 428 U.S. 433 (1976). The Court held that evidence seized by Los Angeles police in violation of the Constitution was admissible in a federal civil tax proceeding. Common sense dictates, the Court stated, that the deterrent effect of the exclusion of relevant evidence is highly attenuated when the punishment is the removal of the evidence from a civil suit by or against a different sovereign. "The extension of the exclusionary rule . . . would be an unjustifiably drastic action by the courts in pursuit of what is an undesired and undesirable supervisory role over police officers." *Id.* at 458.

86. 428 U.S. 465 (1976). The Court held that on petition for habeas corpus relief, a prisoner could not raise the claim that his conviction was based upon evidence obtained by an unconstitutional search where he had been afforded an opportunity for a full and fair litigation of his constitutional claim in state courts. The Court stated:

> There is no reason to believe, however, that the overall educative effect of the exclusionary rule would be appreciably diminished if search-and-seizure claims could not be raised in federal habeas corpus review of state convictions. Nor is there reason to assume that any specific disincentive already created by the risk of exclusion of evidence at trial or the reversal of convictions on direct review would be enhanced if there were the further risk that a conviction obtained in state court and affirmed on direct review might be overturned in collateral proceedings often occurring years after the incarceration of the defendant.

Id at 493 (footnote omitted).

of its police. The federal courts are failing to give any weight to the state's policy judgment without any explanation.

Viewing the problem in terms of sovereignty and supremacy, some courts have come closer to the proper analysis. In *Feldman v. United States,*[87] the defendant had given testimony in a state judicial proceeding under a state immunity statute. This testimony was admitted in the defendant's subsequent federal trial, and the Court held there was no fifth amendment violation by self-incrimination, even though the defendant's testimony was compelled at the state level.[88] Citing Chief Justice Taney, the Court noted that while state and federal governments exist within the same territorial limits, they are separate and distinct sovereignties acting independently of each other.[89] Thus, a state cannot restrict the operation of national government by affecting its rules of evidence. In *Olmstead v. United States,*[90] the Court held a state statute prohibiting the interception of telephone messages would not affect the admission of evidence in a federal trial obtained by federal agents in the proscribed manner. Again the Court cited Chief Justice Taney to emphasize that it could not be supposed that Congress intended to place the criminal jurisprudence of the federal government under the control of state government.[91] Following this analysis, the Tenth Circuit permitted the introduction of evidence seized by state police in violation of state law since "the course of a federal criminal prosecution cannot be controlled by state law."[92]

There can be little argument with the assertion that state courts cannot within their constitutional power "control" the federal courts' evidentiary rules, or that a violation of state law should not be the basis of a federal constitutional violation. By concentrating on the concepts of sovereignty and supremacy, however, state interests are still ignored. A defendant who intelligently pleads a viola-

87. 322 U.S. 487 (1944). The state procedure was known as "supplementary proceedings," designed to aid in the discovery of assets of a debtor. The state immunity statute provided that a debtor might not be excused from testifying because of self-incrimination but that his testimony could not be used in evidence in a subsequent criminal proceeding against him. The defendant Feldman had been a judgment debtor in the state proceeding. *Id.* at 488.

88. *Id.* at 489.

89. *Id.* at 491. Chief Justice Taney is often cited for his views on the separation of state and federal power. *See New Silver Platter, supra* note 10, at 204 n.4.

90. 277 U.S. 438 (1928).

91. *Id.* at 469.

92. Ferguson v. United States, 307 F.2d 787, 790 (10th Cir. 1962), *rev'd and remanded on other grounds,* 375 U.S. 962 (1964).

tion of state constitutional law is not asserting that a federal court must abide by state law, but that it should do so.[93] This necessitates an inquiry beyond power.

The Third Circuit, in *United States v. Shaffer*,[94] resolved the admissibility question on federal grounds, but in doing so was the first court to consider the competing policies at stake. The court believed the application of federal rules was grounded in sound policy considerations. By prohibiting the introduction of evidence obtained by state officers in violation of the state constitution, some convictions would undoubtedly be lost; this result would weaken the congressional policy expressed in the federal criminal statutes. Admittedly, the state had an interest in supervising the conduct of its police officers, but the court felt that policy could be equally effectuated through the use of civil suits. The court decided that whatever harm was done to the state's policy, it was not sufficient to warrant deviation from the federal rules.[95]

In subsequent cases, the Sixth[96] and Eighth[97] Circuits have used a "back door" approach to introduce considerations of state interests. While adhering to the rule that in federal criminal prosecutions federal standards are applied to determine the admissibility of evidence, they note it is permissible to look to state law in the course of the federal determination of admissibility.[98] The decision in each of these cases was no different than if the court had applied a per se "federal law governs" rule. They are significant, however, because in both cases more appropriate questions were asked.

93. The defendant would be equally unsuccessful in making a tenth amendment attack, *i.e.*, arguing that the mere admission of evidence in federal court is the sort of federal action "that impairs the States' integrity or their ability to function effectively in a federal system." *See* United States v. Hall, 543 F.2d 1229, 1245 (9th Cir. 1976) (Koelsch, J., dissenting) (citing Fry v. United States, 421 U.S. 542, 547 n.7 (1975)), *cert. denied*, 429 U.S. 1075 (1977).

94. 520 F.2d 1369 (3d Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976).

95. *Id.* at 1372.

96. United States v. Dudek, 530 F.2d 684, 689 (6th Cir. 1976).

97. United States v. Allery, 526 F.2d 1362, 1365 (8th Cir. 1975).

98. In *Dudek*, state police had seized evidence pursuant to a search warrant but violated OHIO R. CRIM. P. 41(D) by failing to "verify" the inventory and by failing to "promptly" return the warrant. The court gave extensive consideration to the issue of whether under Ohio law the failure would require suppression of the fruits of the search. Under a simple "federal law governs" approach, this discussion would have been superfluous. 530 F.2d at 687-91. In *Allery*, at issue was the admissibility of testimony arguably excludable under a state privilege law; the "exclusionary rule" was not involved. 526 F.2d at 1364-65. The relationship between privileges and the exclusionary rule and the special rules applicable to privileges will be discussed *infra*.

V. Comparison of the Silver and Copper Platter Doctrines

The conflicts and problems created by the copper platter doctrine are not unlike those which led the Supreme Court to eliminate the silver platter doctrine. Justice Frankfurter, in fact, authored a scathing dissent in *Elkins,* demonstrating that the majority's requirement that federal standards be applied, even when state law furnished the defendant greater protection, frustrated the very values the majority was verbally promoting. The *Elkins* rule was to insure a healthy federalism by avoiding needless conflicts between state and federal courts, but copper platter doctrine exacerbates state-federal tensions. The state has imposed the exclusionary rule for certain constitutional or statutory violations to attempt to protect individuals from unlawful police conduct. Far from fostering federalism, the *Elkins* rule disregards valid state policies; it rejects all comity considerations.[99] Frankfurter perceived another problem in the *Elkins* requirement that the federal court make an independent inquiry into the validity of the search. A separate federal court factual finding has the effect of "debilitating local authority" in controlling local police conduct, a matter in which the state courts should have primary responsibility.[100] Frankfurter concludes there is little justification for federal courts to encourage state illegalities.[101]

There would appear to be little doubt that the effect of the copper platter doctrine will be to encourage police misconduct. Whatever deterrent effect the state's exclusionary rule might have on state officers becomes diluted when a federal court admits evidence which the state would have excluded. The Burger Court impliedly recognized this in *United States v. Janis.*[102] The Court believed the deterrent effect was attenuated when the sanction imposed for a constitutional violation by a police officer was the removal of evidence from an action by a different sovereign. But, the Court read *Elkins* to indicate that "the assumed interest of criminal law enforcement officers in the criminal proceeding of another sovereign counterbalanced this attenuation sufficiently to justify an exclusionary rule."[103] Many crimes are a violation of both state and federal laws,

99. Elkins v. United States, 364 U.S. 206, 245, 248 (1960) (Frankfurter, J., dissenting).
100. *Id.* at 248.
101. *Id.* at 246.
102. 428 U.S. 433 (1976).
103. *Id.* at 458. The Court examined the problem in terms of the offending law enforcement officer's "zone of primary interest." It would appear that a prosecution by a different

e.g., possession and sale of narcotics and bank robbery. When investigating these crimes, local police can disregard the stricter rules employed by their state. If the defendant should object and successfully prove the constitutional violation in state court, there is still an opportunity for federal prosecution.

A second concern of the *Elkins* Court in abolishing the silver platter doctrine was judicial integrity—the federal courts should not be a depository for sordid police activities.[104] Justice Frankfurter attacked the majority's reasoning on this point as well, arguing that the *Elkins* decision was inconsistent with the concept of judicial integrity. In measuring the state police conduct by federal standards, the courts might be accepting evidence gathered illegally under state standards. For Frankfurter, it was "unseemly" for federal courts to benefit by state officers' wrongdoing, even though that wrongdoing was determined by state law.[105] Frankfurter was echoing the sentiments of two other great Supreme Court Justices, Brandeis and Holmes, dissenting in *Olmstead:* it is essential that the government not use evidence obtained in violation of state law in order "to maintain respect for law," "to promote confidence in the administration of justice," and "to preserve the judicial process from contamination."[106]

It should be apparent that neither the Supreme Court nor the lower federal courts have adequately addressed the severe state-federal conflicts inherent in the copper platter doctrine—conflicts considered sufficiently severe to cause the demise of the silver platter doctrine. Both the state and federal governments have valid interests at stake in the typical copper platter situation: the state is concerned with the conduct of its police while the federal government seeks enforcement of its criminal laws. But to what extent

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but concurrent sovereign would be within the primary zone. Frankfurter stated: "A state officer who disobeys [a state regulation can] turn his evidence over to the federal prosecutors, who may freely utilize it under [the *Elkin*] innovation in disregard of the disciplinary policy of the State's exclusionary rule." Elkins v. United States, 364 U.S. 206, 245-46 (1960). *See also* United States v. Scolnick, 392 F.2d 320, 328 (3d Cir.) (Freedman, J., dissenting) (to allow state police to violate a state statute and produce to a federal prosecutor the information then obtained for use in a federal trial is to lend federal encouragement to the violation), *cert. denied sub. nom.* Brooks v. United States, 392 U.S. 931 (1968).

104. *See* note 25 and accompanying text *supra.*

105. 364 U.S. at 249-50.

106. Olmstead v. United States, 277 U.S. 438, 484 (Brandeis, J., dissenting), 470 (Holmes, J., dissenting) (1928).

should the federal court pursue its objective when a by-product is infringement on strong state policies?

VI. The Law of Privileges

The law of privileges, as applied in the federal courts, can furnish some foundation for the resolution of this question. Privileges have been subjected to much greater and keener scrutiny by the courts, Congress, and commentators, and thus an examination of the development of this law provides something more than untested abstract concepts with which to approach the problem.

Privileges, or more specifically, the evidentiary rule that term describes, are similar in purpose and effect to the exclusionary rule. Relevant evidence is excluded and hence the truth-finding function of the court is interfered with in order to promote a social interest deemed of sufficient importance to justify the cost. Privileged information is information obtained through a confidential relationship; it cannot be divulged in court if the holder of the privilege objects to disclosure. In this manner, a privilege is intended to promote the full and free disclosure of information between individuals in certain positions.[107] Many privileges, unlike the exclusionary rule, have well established lineages, many with common law origins.[108] Nevertheless, they have been the subject of constant attack by distinguished scholars, as is evidenced by the American Law Institute's attempt to limit the scope of many privileges in its formulation of the Model Code of Evidence.[109]

Not surprisingly, the several states and the federal government made different value judgments and consequently recognized different privileges. A question akin to that presented in the copper platter situation arose, therefore, when in a federal proceeding someone

107. *See* McCormick's Handbook of the Law of Evidence § 72 (2d ed. E. Cleary 1972). *Cf.* 8 J. Wigmore, Evidence § 2192 (McNaughton rev. ed. 1961).

108. For example, the notion that the loyalty owed by the lawyer to his client disables him from being a witness in his client's case is deep-rooted in Roman law. McCormick's Handbook of the Law of Evidence § 87 (2d ed. E. Cleary 1972). The privilege for marital communication is an offshoot, albeit late, of an ancient tree. *Id.* § 78. The development of judge-made privileges has perceptibly slowed and today statutory privileges predominate. *Id.* § 77.

109. *See id.* § 77, at 156-57 ("The draftsmen of the Model Code clearly favored limiting the scope of some, if not all, of the privileges, but when the proposed draft was submitted to the American Law Institute for final approval concessions had to be made and . . . the generally recognized common law and statutory privileges [were] largely retained . . . .").

tried to block testimony by claiming a privilege valid only under state law. Modern federal law on this issue finds its genesis in two Supreme Court cases circa 1935. In *Funk v. United States,*[110] the defendant was convicted in federal court for violation of federal prohibition laws, but claimed as error the trial court's ruling that his wife was incompetent to testify on his behalf. Based on decisions prior to *Funk,* federal courts, in determining evidentiary matters in federal criminal prosecutions, had applied the law of the states as it existed when federal courts were established by the Judiciary Act of 1789. *Funk* rejected the common law disqualification stating that federal courts have the power to alter the federal rules when fundamentally altered conditions necessitated a change in the common law principles.[111]

Clearly, *Funk* did not involve a question of state-recognized privileges, but it was used as authority in *Wolfle v. United States,*[112] where the Supreme Court refused to recognize a state privilege for marital communications. In *Wolfle,* the Court, citing *Funk,* held that the admissibility in a federal criminal trial of a secretary's testimony concerning a conversation between the defendant and his wife was "not necessarily" to be determined by local rules but rather by "common law principles as interpreted and applied by the federal courts in the light of reason and experience."[113] Unfortunately, the Court did not interpret its "not necessarily" language as indicating the need to consider the state policies at stake. In rejecting the claim of privilege in *Wolfle,* the Court weighed the federal interests allegedly served by the privilege against the disadvantages to the administration of federal justice. The rule that federal law was to resolve privilege questions was codified some ten years later in rule 26 of the Federal Rules of Criminal Procedure,[114] and was ultimately

110. 290 U.S. 371 (1933).
111. *Id.* at 382.
112. 291 U.S. 7 (1934).
113. *Id.* at 12.
114. At that time rule 26 provided:

> In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

FED. R. CRIM. P. 26, 18 U.S.C. app. R. 26 (1970). *See also* FED. R. CRIM. P. 26, *Notes of the Advisory Committee on Rules.* Since the adoption of the Federal Rules of Evidence, rule 26

incorporated into rule 501 of the Federal Rules of Evidence,[115] which became effective in July, 1975. In its note to rule 501, the Advisory Committee on the Federal Rules of Evidence little doubted the inviolable nature of *Wolfle's* statement of the law: "In federal criminal prosecutions the primacy of federal law as to both substance and procedure has been undoubted."[116] But despite the *Wolfle* Court's and the Advisory Committee's complete rejection of state law,[117] it is not clear that the lower federal courts applied this absolute rule, at least prior to the Federal Rules of Evidence. Judge Weinstein, a respected writer on federal evidentiary rules, noted that a close analysis of all decisions, reported and unreported, would probably indicate that in most decisions, courts were seeking a result consistent with the state policy involved.[118]

The Advisory Committee supported its approach with several policy considerations. First, by reducing the availability of privileges,

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has been amended: "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court." FED. R. CRIM. P. 26.

115. Rule 501 reads:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness . . . shall be determined in accordance with State law.

FED. R. EVID. 501.

116. FED. R. EVID. 501, *Notes of Advisory Committee on Proposed Rules, reprinted in* 2 J. WEINSTEIN, WEINSTEIN'S EVIDENCE ¶ 501[01], at 501-6 (1975).

117. That there has been a complete rejection of state law is not clear. *See* note 118 and accompanying text *infra*. That *Wolfle* and rule 501 demand complete rejection is also not clear. Common law principles applied by the federal courts "in light of reason" do not preclude consideration of state interests. However, as noted, when the Supreme Court rendered the *Wolfle* decision, it did not consider state interests. *See* notes 113-14 and accompanying text *supra*.

118. Judge Weinstein focuses on the unreported rulings.

> For every ruling of evidence discussed in a published opinion there are hundreds made from the bench on the spur of the moment in almost reflexive responses to objections. The impact of engrained state practice in these instances is probably much higher than it is where the judge must justify his decision in writing after examining current authority.

Weinstein, *The Uniformity-Conformity Dilemma Facing Draftsmen of Federal Rules of Evidence*, 69 COLUM. L. REV. 353, 372 n.82 (1969). He cites as some support, Barnes v. United States, 374 F.2d 126 (5th Cir.), *cert. denied*, 389 U.S. 917 (1967), where the court held that the physician-patient privilege was not available to a defendant in a federal criminal trial because Texas, the state in which the information was conveyed, did not recognize the privilege.

the rule would promote the fundamental policy of rules of evidence—enhancing accurate fact-finding. Second, the Committee felt that only an overriding policy could suffice to compensate for the loss of relevant evidence. The Committee believed that any state privilege meeting this test would also be recognized in federal court. Third, the federal system had a sufficient interest in the adoption of sound and uniform rules of evidence to override a state's judgment that a certain privilege was desirable.[119] And, in a note to a preliminary draft of rule 501, the Advisory Committee stated that "[n]o state can have a deep interest in the suppression of information except on a constitutional basis."[120]

Most commentators have agreed with the nonapplicability of state privilege law at least in federal criminal trials:[121] "the federal interest in correct and just decisions when applying federal laws" outweighs the state interest promoted by a privilege.[122]

Agreement with federal exclusivity is, however, not universal. Shortly after the federal rules were proposed, some commentators questioned the desirability of reducing the number of available privileges,[123] maintaining that in modern society, privileges are important as protectors of individual privacy.[124] But in many areas of

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119. *See* FED. R. EVID. 501, *Notes of the Advisory Committee on Proposed Rules, reprinted in* 2 J. WEINSTEIN, WEINSTEIN'S EVIDENCE ¶ 501[01], at 501-8 to -10. *See also* 2 J. WEINSTEIN, WEINSTEIN'S EVIDENCE ¶ 501[03], at 501-21 to -22 (1975) [hereinafter cited as WEINSTEIN]. As noted, *see* note 116 and accompanying text *supra*, the Advisory Committee did not believe it needed to defend its approach to federal criminal cases. These arguments were to support applying federal privilege law in diversity cases, when state law furnished the rule of decision. Certainly, the Committee would have employed these arguments (along with others) to justify federal privilege law in federal criminal cases if put to the task.

120. Advisory Committee's Note to Rule 5-01 (Preliminary Draft 1969).

121. *See* 2 WEINSTEIN, *supra* note 119, ¶ 501[03] at 501-25. *See, e.g.*, 10 MOORE'S FEDERAL PRACTICE § 501.05, at V-30 (2d ed. 1976); Korn, *Continuing Effect of State Rules of Evidence in the Federal Courts*, 48 F.R.D. 65, 77 (1969) [hereinafter cited as Korn]; Ladd, *Privileges*, 1969 L. & SOC. ORD. (ARIZ. L.J.) 555 [hereinafter cited as Ladd]; Wright, *Procedural Reform: Its Limitations and Its Future*, 1 GA. L. REV. 563, 573 (1967) [hereinafter cited as *Procedural Reform*].

122. *See* Korn, *supra* note 121, at 77.

123. *See, e.g.*, Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 GEO. L.J. 61 (1973) [hereinafter cited as Krattenmaker]; Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 122 (1956) (attacking application of federal rules of privilege before formulation of Federal Rules of Evidence).

124. *See* Krattenmaker, *supra* note 123, at 85-86 (limitations on testimonial privileges are "clearly" invasions of privacy). *See also* MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 77, at 157 (2d ed. E. Cleary 1972) ("Growing concern in recent times with the increase in official prying and snooping into the lives of private individuals has reinforced support for the traditional privileges and no doubt aided in the creation of new ones.").

privilege law, the answer to whether the exclusion of evidence is too great a price to pay to foster the protected relationships is a question over which reasonable men could differ.[125] To the extent the problem is one purely of federal law, further argument would be fruitless. But competing state and federal interests are involved, and a strategically more sound attack on the federal rule, and a tack taken by some commentators, is to question the rule's failure to accord any weight to a state determination that a particular privilege is desirable.

A respected critic of federal privilege law, Professor Louisell, addressed the rule as it was embodied in Federal Rule of Criminal Procedure 26 and commented that as a matter of comity, due regard should be given for local institutions and local interests. Privileges represent substantive rights protected by the states, institutions competent in a federal system to protect such rights. Certainly it is more convenient for the federal government to ignore state privileges, but that does not mean that enforcement of federal criminal law would be hampered if the federal courts respected the state's judgment.[126]

Another commentator, Professor Krattenmaker, also focused on the federal rule's effect of impinging on an important state function. He proceeded from the assumptions that privileges do foster the right of privacy and that a state privilege greater than a federally recognized privilege is evidence of a state's desire to provide breathing space for individual liberties. Circumscribing the extent to which federal courts could override state rules would assure continued vitality of those liberties. More importantly, respecting the state's privileges would avoid a "monolithic single shot judgment" on what the proper balance is between the need for evidence and the interests forwarded by privileges, and, in fact, allows for experimentation in the quest for the most appropriate balance. Finally, due respect for federalism should lead to encouragement of laws tailored to meet the divergent problems under differing local circumstances.[127]

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125. *See* Ladd, *supra* note 121, at 573 (author suggests several factors which go into the balancing).

126. Louisell, *supra* note 123, at 122-23.

127. Krattenmaker, *supra* note 123, at 100-02. One of the basic virtues of a federal government is that it allows room for governmental and social experimentation by the many states. Only in this way can many of the complex problems we face be solved. The need for states to serve as laboratories has been emphasized by several Supreme Court Justices. *See* Johnson

These comity arguments have not gone unanswered. In a sense, the rationale of the federal exclusivity rule responds to the state/federal conflict. Federal rules should apply because it is federal policy which is being enforced; no state interest can surmount the federal interest present in such circumstances. Professor Moore, in his treatise on federal practice, elucidates this counter-argument in favor of rule 501. "Privileges, because of their important impact on modes of proof in the federal courts, represents a type of state law which does 'interfere with the appropriate performance' of the federal courts' functions . . . . The obligations of comity cease when state law begins to alter the appropriate functioning of the federal courts."[128]

On balance, it appears that the supporters of federal exclusivity have not refuted the comity objections to the absolute rule. Comity, or federalism, terms often associated today with the abstention doctrine, were defined by Justice Black, in *Younger v. Harris,*[129] as

> a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.[130]

Certainly, when the state interest in promoting a certain relationship through a privilege is weighed against the federal government's interest in unobstructed access to relevant evidence, a "proper respect for state functions" may not *compel* federal court deference to state law. But it is a complete and unwarranted disregard of comity to argue, as the federal rule supporters have, that the federal interest is so overwhelming that the importance of the state function need not be evaluated.[131]

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v. Louisiana, 406 U.S. 356, 376 (1972) (Powell, J., concurring); Williams v. Florida, 399 U.S. 78, 133 (1970) (Harlin, J., concurring); New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

128. 10 MOORE'S FEDERAL PRACTICE § 501.05, at V-30 (2d ed. 1976).

129. 401 U.S. 37 (1971) (federal court forbidden to enjoin a pending state criminal prosecution).

130. *Id.* at 44.

131. Charles Alan Wright supports the rule applying federal privilege law in a federal criminal case, but admits that even then there is an interference with state policy. *See Procedural Reform, supra* note 121, at 573. *See also* Krattenmaker, *supra* note 123, at 100 & n.152.

Nevertheless, the Federal Rules of Evidence proposed by the Supreme Court were enacted by Congress only after plenary, not simply cursory, scrutiny.[132] Article V of the Rules of Evidence on privilege, as submitted to Congress by the Supreme Court, contained thirteen specific rules, some of which were restrictions upon common law privileges. The House revised Article V, and the result was a single rule 501—privileges were to be determined by the federal courts' reasoned interpretation of common law.[133] The Senate Committee on the Judiciary agreed with the main thrust of the rule as amended by the House—a federally developed common law should apply "except where the State nature of the issues renders deference to State privilege law the wiser course, as in the usual diversity case."[134] Controversy surrounding the bill centered only on the treatment of privileges in diversity cases.[135] As the conference report noted, both the House and Senate intended federal privilege law to apply in criminal cases.[136] Thus, the conflict between state and federal law was apparent to Congress, and it consciously chose the federal law of privileges to be used in federal criminal trials. Under rule 501 of the Federal Rules of Evidence, therefore, the federal courts are, in criminal trials, prevented from allowing comity considerations to influence privilege choice of law questions.

VII. The Federal Rules of Evidence and Copper Platter Evidence

Similar constraints do not exist when the issue shifts to the exclusion of evidence seized by state police in violation of state law. Rule 402 of the Federal Rules of Evidence governs the admissibility of evidence: "All relevant evidence is admissible except as otherwise

132. Under its statutory authority to prescribe rules of procedure in the United States courts, the Supreme Court formulated and transmitted to Congress proposed rules of evidence. They were to become effective in 90 days in the absence of a congressional veto. Shortly thereafter, Congress passed a bill, Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9 (1973), which required affirmative congressional approval before the rules would become effective. *See* Krattenmaker, *supra* note 123, at 61.

133. H.R. Rep. No. 650, 93d Cong., 2d Sess. [hereinafter cited as House Report], *reprinted in* [1974] U.S. Code Cong. & Ad. News 7075, 7082.

134. S. Rep. No. 1277, 93d Cong., 2d Sess. [hereinafter cited as Senate Report], *reprinted in* [1974] U.S. Code Cong. & Ad. News 7051, 7058.

135. *See* House Report, *supra* note 133; Senate Report, *supra* note 134. *See also* 2 Weinstein, *supra* note 119, ¶¶ 501[02], 501[03].

136. *See* Conf. Rep. No. 1597, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 7098, 7100-01.

provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority."[137] Arguably, the same interest in the just and efficient administration of federal criminal law could lead to interpreting rule 402 as rejecting any consideration of state law. Furthermore, rule 26 of the Federal Rules of Criminal Procedure,[138] which governed evidence in federal criminal trials prior to the adoption of the rules of evidence, was basically preserved in rules 402 and 501 of the Federal Rules of Evidence. In the Advisory Committee Notes to rule 26, it was stated that the "rule contemplates the development of a uniform body of rules of evidence to be applicable in trials of criminal cases in the federal courts."[139] Certainly, uniformity is equally a goal of the Federal Rules of Evidence and specifically rule 402. Thus, efficiency, in the sense that relevant evidence is not excluded, and uniformity, both reasons for the creation of the Federal Rules of Evidence, are furthered by reading rule 402 as requiring the admission of copper platter evidence. Finally, when considering the similarity in privilege rules and the exclusionary rule, Congress' strong stand on rule 501, that federal privilege law is to govern in federal criminal trials,

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137. FED. R. EVID. 402.

138. Before adoption of the Federal Rules of Evidence, rule 26 of the Federal Rules of Criminal Procedure provided that the admissibility of evidence was to be determined by principles of common law as interpreted by federal courts. FED. R. CRIM. P. 26, 18 U.S.C. app. R. 26 (1970). *See* note 114 *supra.*

The Federal Rules of Criminal Procedure impose requirements for the issuance of a federal search warrant in addition to constitutional requirements. *See, e.g.,* FED. R. CRIM. P. 41(a) (warrant may only be issued by a judge of the United States or of a state court of record). However, if the search is a state search, with minimal or no federal involvement, the warrant need only conform to federal constitutional requirements. *See* United States v. Millar, 543 F.2d 1280, 1283 (10th Cir. 1976). Thus, under the copper platter doctrine, a defendant who is subjected to a search and seizure by state police loses the additional protections state law would provide and the additional federal statutory protections. One court has shown some sensitivity to this problem and stated:

> [P]roducts of a search conducted under authority of a *validly issued* state warrant are lawfully obtained for federal prosecutorial purposes if the warrant satisfies constitutional requirements and does not contravene any Rule-embodied policy designed to protect the integrity of the federal courts or to govern the conduct of federal officers.

United States v. Sellers, 483 F.2d 37, 43 (5th Cir. 1973), *cert. denied,* 417 U.S. 908 (1974) (emphasis added). It is doubtful that by requiring the warrant to be validly issued under state law the court meant to draw in state substantive law. Nevertheless, under this approach, the defendant would appear to have the benefits of at least some of the additional federal statutory protections.

139. FED. R. CRIM. P. 26, 18 U.S.C. app. R. 26 (1970), *Notes of Advisory Committee on Rules.*

strongly suggests the aforementioned reading of rule 402 is the correct one.

But the Supreme Court should not feel so limited in this area. Congress did leave the Court with power to fashion other rules,[140] and authority for the change can be found in the Advisory Committee's Note to rule 402. "The rule recognizes but makes no attempt to spell out the constitutional considerations which impose basic limitations upon the admissibility of relevant evidence."[141] By definition, copper platter evidence is not obtained in violation of the United States Constitution. As noted earlier,[142] however, many have misconstrued the situation and thought it to be a problem of constitutional magnitude. Congress could well have believed the problem to be one with constitutional dimensions, thus recognizing the power of the courts to restrict such evidence. Even assuming, however, Congress saw no constitutional infringement, it appears that Congress simply did not address the issue, and did not intend rule 402 to mandate admission of evidence seized in violation of state law by state police.

Despite the similarities between privileges and the exclusionary rule, it cannot be asserted that Congress' action on one should influence the Court's treatment of the other. The interests at stake are very much different. Privileges are intended to promote the full and free disclosure of information in certain confidential relationships. This is an important goal to be sure, but one not on the same plane as controlling law enforcement officials. Much information is disclosed without reliance on, or even thought of, applicable privileges;[143] application of a narrower federal privilege, therefore, will often have little effect on individual conduct. Failure to curb police abuses, on the other hand, is likely to have broad social consequences, ultimately affecting many individual liberties. The state's

140. "All relevant evidence is admissible, except as otherwise provided . . . by other rules prescribed by the Supreme Court pursuant to statutory authority." FED. R. EVID. 402. The Supreme Court's statutory authority is found in 18 U.S.C. § 3771 (1970): "The Supreme Court . . . shall have the power to prescribe . . . rules of . . . procedure . . . in criminal cases . . . in the United States district courts . . . ." All rules, however, must be reported to Congress which can act on the proposals or simply let the proposals become effective.

141. FED. R. EVID. 402, *Notes of Advisory Committee on Proposed Rules.*

142. *See* notes 61-65 and accompanying text *supra.*

143. Wright notes: "Of course there is very little evidence that people consult the local law of privilege before making, or refraining from making, confidential communication. Indeed such evidence as exists indicates that they do not." *Procedural Reform, supra* note 121, at 573.

interest is much more direct when the application of its exclusionary rule is involved, since the state is primarily responsible for governing the conduct of its police.

A second and even more crucial distinction between privileges and the exclusionary rule exists: the concept of judicial integrity as a basis for the exclusionary rule. McCormick suggests that with the deterrence aspect of the exclusionary rule becoming more questionable, it is the "moral position" which justifies continuation of the rule. By refusing to accept and consider evidence tainted "by improper activity, the courts publicly reaffirm their own respect of the underlying rules."[144] A federal court can admit testimony which would have been privileged under the state's rules without encouraging in any way an offense under state law. But in accepting evidence seized by state police in violation of state constitutional law, the federal court is condoning the illegal police activity. Thus, simply because Congress emphatically stated that federal privilege law is to apply in federal criminal trials, it does not follow that federal courts should ignore a state's exclusionary rules in a federal criminal trial where copper platter evidence has been offerred.

VIII. New Approach to Copper Platter Problems

A. The States' Conflicts of Law Analysis

The Supreme Court must therefore reorient federal practice in its handling of evidence seized by state police in violation of state law and offered in a federal criminal trial. The states have been confronted by the same problem and their approaches are worthy of note. The question before the state courts is first one of constitutional choice of law. It is generally believed that the fourth amend-

144. McCormick's Handbook of the Law of Evidence § 166, at 368 (2d ed. E. Cleary 1972). Chief Justice Burger, however, does not believe there is *any* validity to the "judicial integrity" justification. "[S]ettled rules demonstrate that the 'judicial integrity' rationalization is fatally flawed." Stone v. Powell, 428 U.S. 465, 499 (1976) (Burger, C.J., concurring). Burger's main argument is that the Court has refused to entertain claims that evidence was unlawfully seized unless the claimant has standing. Notions of judicial integrity would call for excluding the evidence regardless of the claimant's standing. A majority of the Court does agree to some extent with Burger. In two recent cases in which the Court refused to extend the exclusionary rule, the Court mentioned the "limited role" of the "judicial integrity" justification in the determination of whether to apply the rule in a particular context. *See* Stone v. Powell, 428 U.S. 465, 485 (1976); United States v. Janis, 428 U.S. 433, 458 & n.35 (1976). Nevertheless, it is still a consideration and one which clearly distinguishes the exclusionary rules from privileges.

ment requirements as interpreted by the United States Supreme Court are the *only* minimum standards an out-of-state search must meet to be constitutionally admissible in a different state's criminal proceeding.[145] Some courts have thus proceeded in a fashion similar to the federal courts and simply apply their own law. In *Burge v. State,*[146] evidence seized in a search of the defendant's Oklahoma apartment was admitted in his Texas criminal trial for burglary. The search conducted by Oklahoma police was illegal under Oklahoma law, but valid under Texas law and the United States Constitution. Relying on traditional conflicts of law principles, the Texas court classified evidentiary rules as rules of procedure and therefore the law of the forum applied on all evidentiary issues.[147]

The procedural/substantive law distinction and the doctrine of lex loci, however, have fallen into disrepute as viable conflicts of law principles.[148] In their place is the significant relationship test: the law to be applied to a particular issue is the law of the state that has the most significant relationship to that issue. This more modern approach has found expression in some state copper platter cases. In *People v. Saiken,*[149] evidence seized in Indiana, invalid under Indiana law, was admitted in an Illinois criminal trial. The court found Illinois to be the state with the most significant relationship: the crime was committed in Illinois, the crime was prosecuted in Illinois, the defendant was a resident and citizen of Illinois, and a majority of the witnesses were Illinois residents. The court concluded that Indiana had no vital contact with the *crime,* and therefore application of Illinois evidentiary rules would not offend interstate comity.[150] As a matter of pure conflicts law, the decision is wrong. The court focused on Indiana's relationship to the crime in which Indiana admittedly had no interest, and failed to concentrate on Indiana's interest in the more narrow and appropriate issue, the validity of the search. The search was conducted by Indiana police

145. Patterson v. Lash, 452 F.2d 150 (7th Cir. 1971), *cert. denied,* 405 U.S. 1075 (1972) (federal habeas relief denied to defendant convicted in Indiana state trial with evidence seized by Ohio police in violation of Ohio law but valid under the United States Constitution).

146. 443 S.W.2d 720 (Tex. Crim. App.), *cert. denied,* 396 U.S. 934 (1969).

147. *Id.* at 723. Demonstrating its insensitivity to the problem, the court justified applying its own evidentiary rules by stating: "Any other view would lead to endless perplexity." *Id.*

148. *See, e.g.,* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 200-10 (1971) [hereinafter cited as WEINTRAUB].

149. 49 Ill. 2d 504, 275 N.E.2d 381 (1971), *cert. denied,* 405 U.S. 1066 (1972).

150. *Id.* at 511, 275 N.E.2d at 385.

in Indiana; Indiana's interest was thus clear. It follows that Illinois' out-of-hand dismissal of comity objections was also wrong.

Apparently sensing this problem, the Illinois Court of Appeals refined the argument in *People v. DeMorrow.*[151] First it highlighted stronger Illinois interests in both the crime and the search. Not only was the crime committed in Illinois, but the victim was an Illinois resident. Furthermore, the search in Michigan was conducted primarily by Illinois police officers. In the court's view, comity did not require Illinois to encourage Illinois policemen to follow the procedures of other states, nor did it require Illinois to assist in supervising, through the use of the exclusionary rule, the Michigan police officers.[152]

What comity does require when the concern is the conduct of another states' law enforcement officials is not as clear as the *DeMorrow* court suggests, but the *DeMorrow* rationale is superior to the *Saiken* decision since it considers the interests of the respective states in the specific issue at hand—*i.e.*, the manner in which the evidence was obtained.[153]

A lucid treatment of the respective interests of the states involved in a copper platter question can be found in *People v. Orlosky,*[154] where a California court of appeals analyzed, with a proper regard for interstate comity, the purposes to be served by an Indiana exclusionary rule.[155] The defendant was convicted of theft from a company in California committed while he was an employee at the company. One year after the defendant had terminated his employ-

151. 17 Ill. App. 3d 901, 308 N.E.2d 659, *aff'd,* 59 Ill. 2d 352, 320 N.E.2d 1 (1974).

152. *Id.* at 911, 308 N.E.2d at 665.

153. *See also* People v. Graham, 90 Misc. 2d 1019, 396 N.Y.S. 2d 966 (1977). A New York citizen was robbed, kidnapped, and murdered in New York. The defendants, residents of New York, were contesting searches made in New Jersey and Florida. The court admitted that New Jersey and Florida had an interest in the case because of their interest in police conduct within their respective territories. The court, however, believed those interests to be minor compared to New York's interest in the prosecution of a crime committed against its resident on its own soil. This was especially so because the police activity in New Jersey and Florida was mainly conducted by New York police.

154. 40 Cal. App. 3d 935, 115 Cal. Rptr. 598 (1974).

155. The California court's discussion is to be distinguished from the federal court's analysis of the exclusionary rule in copper platter doctrine cases criticized at notes 78-86 and accompanying text *supra.* The federal courts have only considered the benefits and costs of the exclusionary rule within the context of the federal court system and federal law enforcement; they have refused to consider what impact their rejection of the valid state rule will have on the state. California addressed the question of what effect its rejecting or enforcing another state's exclusionary rule would have on that state.

ment, the contested evidence was seized by Indiana police while searching the defendant's Indiana apartment on an unrelated charge. The search was invalid under Indiana law. The California court first rejected any notion that, in the interstate setting, the exclusionary rule preserved judicial integrity by preventing the courts from benefitting from the illegal acts of police officers. Copper platter evidence, reasoned the *Orlosky* court, can not impugn the integrity of the court which admits it since the admitting court does not regard the conduct which resulted in obtaining the evidence as improper. And surely, admission of the evidence in California did not affect the judicial integrity of the Indiana courts. The court similarly disposed of the deterrence/discipline aspect of the exclusionary rule. The court admitted Indiana had an interest in disciplining its officers wherever the criminal action was brought. But the court reasoned that excluding from a California criminal trial evidence illegally seized by Indiana police would have little deterrent effect.[156] This was particularly apparent under the facts of *Orlosky*. The search by Indiana police was in relation to an Indiana crime. Whatever Indiana intended to accomplish by imposing the exclusionary rule in Indiana trials was in no way advanced by extending the rule to California trials, since the police were operating solely with a view toward Indiana law. The *Orlosky* court logically concluded that Indiana's interest in applying the rule to the California trial was minimal and more than outweighed by California's interest in an unimpeded local prosecution of a local crime.

The outcome in the state courts, even though the significant relationship test is being applied, has thus far paralleled the federal court results—the laws of the prosecuting forum are applied. But the state courts are focusing on the much more relevant question: what are the interests of the state where the alleged police misconduct occurred vis a vis the interest of the prosecuting state.

B. The New Approach for Federal Courts

The federal courts should adopt a similar balancing of interests test. Undoubtedly, weighing the interests of one independent sovereign against those of another is a difficult task for any court to undertake.[157] In fact, one might well question: why should such con-

156. 40 Cal. App. 3d at 939, 115 Cal. Rptr. at 601.

157. *See* WEINTRAUB, *supra* note 148, at 234. Recall, this was the Texas court's justification

fusion be added to a criminal trial if the decision on admissibility will not be altered? Commentators in conflicts of laws studies have analyzed the relatively recent shift to the significant interest approach and noted that a court's announcement that its interests are found to be weightier is not likely to be particularly cogent.[158] Thus, the preceeding state decisions may be open to attack. But whether those cases demonstrate a proper balancing of state versus state interest is not of utmost importance here. Because state and federal courts have concurrent jurisdiction, an analysis of their respective interests will be much different and, it is suggested, the interests are weighted in favor of applying state law, at least in some situations. Often, the place of the crime, the place of the police misconduct, and the residence of the victim and the defendant will be within the jurisdiction of both the state and federal court. These factors indicate a strong state interest notwithstanding that prosecution is for a federal crime. In the state versus state setting, where the crime was committed never coincided with where the police misconduct occurred. When the issue is federal versus state, the state is interested in the prosecution of the federal crime because, usually, the defendant's alleged acts will also constitute a state crime. The state in a sense, has chosen not to prosecute, or at least not to convict the defendant with the evidence that state police illegally obtained. Some weight should be accorded this decision.

Next, the state has a strong interest in controlling its police, and a stricter exclusionary rule is one means it has employed to accomplish this. In contrast to the little effect at the state versus state level, ignoring a state's exclusionary rule in federal court will have an impact. The state police official can conduct himself with an eye toward both the state and the less restrictive federal law.[159] If his

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for refusing to consider another state's evidentiary rules in Burge v. State, 443 S.W.2d 720 (Tex. Crim. App.), *cert. denied*, 396 U.S. 934 (1969). *See* note 146-47 and accompanying text *supra*. In dissenting in *Elkins*, Justice Frankfurter admitted there would be difficulties in applying state law to state searches. But he believed the difficulties were "inherent in evolving harmonious relations in the interconnected interests between the States and the Nation in our federal system." Elkins v. United States, 364 U.S. 206, 251 (1960). Whatever consequences resulted, including occasional frustration of important federal prosecutions, were, to Justice Frankfurter, more than outweighed by the support which should be afforded to valid state law enforcement.

158. *See* WEINTRAUB, *supra* note 148, at 234.

159. *See* notes 101-03 and accompanying text *supra*. Since many criminal acts are both state and federal crimes, the local police need not be concerned with stricter state standards; even if the evidence is suppressed in the state trial, it will be admitted in a federal trial.

misconduct is alleged and proved in state criminal proceedings, he may still secure a conviction by turning the evidence over to the federal authorities, knowing his conduct would be considered permissible by federal standards.

The judicial integrity concept also has vitality in the federal versus state arena. Unlike a state court which will only occasionally rule on the conduct of the police of a different sovereign, a federal court will frequently receive evidence obtained by police of the state in which the court sits. The federal court surely risks being viewed as a depository for "sordid" state police activities.

Of course, other factors should go into the balance, specifically: was the search state or federal in nature and was the search in connection with a purely federal crime or was a state criminal statute also arguably violated. As the police conduct becomes more federal in nature, the state's interest in controlling that conduct diminishes.[160]

IX. Conclusion

Tension between federal and state courts is inherent in our federal system.[161] But "[t]he happy relation of states to nation . . . is in no small measure dependent on the wisdom with which the scope and limits of the federal courts are determined."[162] The Supreme

160. A whole body of case law has developed to determine when a search is federal or state in nature. *See* note 15 *supra*. This would appear to be a useful approach to the balancing issue. As noted, *see* note 49 *supra*, the state has less interest and certainly little power to effect a search federal in nature. But when the search is state in nature, the state interest is apparent and should be respected.

Judge Ziegler, originally a Pennsylvania common pleas judge and now a federal district judge, has also advocated the abolishment of the copper platter doctrine. But he does so under much more restricted circumstances: "Federal courts should abandon the test which provides that a federal court will consider only federal constitutional imperatives when a state court *adjudicates a matter* under state law." Ziegler, *supra* note 11, at 253. The state's interest would certainly be apparent under these facts. If the state has begun criminal proceedings, then the defendant has allegedly committed a state crime. Furthermore comity considerations would appear to be stronger when the state has already adjudicated the evidentiary matter. However, the cases adjudicated by state courts do not represent all matters in which the state has an interest. Often the decision will be made at the District Attorney's office not to prosecute, realizing that the evidence could not be introduced in state court. Second, and more importantly, the state interest we are concerned with is control of state police conduct. Where the search is basically a federal search and only incidentally is evidence turned over to state authorities, then the state has little interest in a subsequent federal criminal trial.

161. *See* Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 Cornell L.Q. 499, 500 (1928).

162. *Id.*

Court has recently indicated a willingness to sacrifice federal interests to prevent clashes with state courts. In *Juidice v. Vail,*[163] the plaintiff sought to enjoin a state civil contempt proceeding allegedly depriving him of due process, by instituting a section 1983 action. Despite the fact that section 1983 was intended to interpose federal courts between the states and individuals, the Court extended the abstention doctrine to section 1983 claims based on notions of comity. Section 1983, if it is to be effective, would appear to be antithetical to comity. The federal intrusion is arguably greater when it directly affects on-going state proceedings, certainly a concern in *Juidice*, but the Court has demonstrated similar respect for state interests in federal habeas corpus proceedings, wherein defendants collaterally attack their *finalized* state convictions. In *Wainwright v. Sykes,*[164] the Court held that the defendant's failure to make a timely objection under a state contemporaneous objection rule to statements allegedly taken in violation of the *Miranda* rules barred federal habeas review in the absence of a showing of cause for the noncompliance and a showing of actual prejudice. The Court rejected an earlier case which gave the federal courts much more latitude in such situations[165] because the previous decision accorded too little respect to a state procedural rule, a rule employed by a coordinate jurisdiction within the federal system.

In both cases, the parties were asserting important federal rights; thus, the federal interest was clear and strong. But, the Court never suggested it was without power to act; rather, it imposed limitations on federal courts because of considerations of comity.[166] It is apparent, then, that the existence of federal interests, even strong federal interests, should not preclude an examination of the state interests.

It is primarily the states which are responsible for combatting crime within their jurisdictions while at the same time effectively controlling the conduct of the police and thereby protecting the freedom of their citizens. The states, in fact, have often been viewed as laboratories, experimenting with various approaches to improve criminal justice while meeting the minimum federal constitutional

163. 430 U.S. 327 (1977).

164. 433 U.S. 72 (1977).

165. Fay v. Noia, 372 U.S. 391 (1963) (state prisoner is denied access to federal habeas relief only upon a finding that he "deliberately bypassed" a state rule, and thus waived his right to present the federal issue to the state courts).

166. *See* Wainwright v. Sykes, 433 U.S. at 83, 88; Juidice v. Vail, 430 U.S. at 335 n.11.

requirements.[167] Those states which have imposed constitutional restrictions on police greater than those required by the United States Constitution have chosen to provide greater breathing space for the individual liberties involved. Reiterating the observations of Professor Krattenmaker, respecting the state exclusionary rule avoids a monolithic single shot judgment on what is the proper balance between liberties and the need for evidence.[168] Rejecting the state rules at the federal trial will surely frustrate, to some degree, the states' experimentation. More importantly, federalism would seem to require that federal courts respect state laws tailored to meet local problems.[169] Controls on local police should therefore be enforced even at the federal level.

To date, very few federal courts have even considered the valid state interests present when evidence seized by state police in violation of state law is offered in a federal criminal trial. The federal courts should adopt a conflicts of law significant relationship or balancing of interests test to resolve these issues. Furthermore, if the courts give adequate consideration to the opposing interests, they will often, if not always, apply the state law to determine the validity of a "state search."

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167. *See* note 127 *supra*.
168. Krattenmaker, *supra* note 123, at 101.
169. *Id.* at 102.